IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 27TH MARCH 2007 / 6TH CHAITHRA 1929

Ex.FA.No. 25 of 2006()

AGAINST THE ORDER DATED 21/03/2006 IN IA.NO.2976/2004 IN OS.259/2003 of PRL.SUB COURT,TRIVANDRUM
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APPELLANTS/PETITIONERS :
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1. SAHADEVAN, AGED 62 YEARS,
   S/O.DAMODHARAN NAIR, R.S.BHAVAN,
   KADAKKAL, KOLLAM DISTRICT.

2. CHINSHA, AGED 19 YEARS,
   S/O.SAHADEVAN, R.S.BHAVAN, KADAKKAL,
   KOLLAM DISTRICT.

   BY ADV. SRI.M.V.THAMBAN

RESPONDENTS/COUNTER PETITIONERS :
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1. SASIDHARAN V.P.,
   RAF 10-2, PANICKERS LANE, SASTHAMANGALAM,
   THIRUVANANTHAPURAM.

2. RADHAMMA, R.S.BHAVAN,
   KADAKKAL, KOLLAM.

   R1 BY ADV. SRI.RAM MOHAN.G. AND SRI.G.P.SHINOD
   BY ADV. SRI.MANU V.

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 27/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

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Ex.F.A. No. 25 OF 2006

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Dated this the 27th March, 2007

J U D G M E N T

Sankaran, J:

Claim petitioners in I.A. 2976 of 2004, whose application under Order XXXVIII Rule 5 of Code of Civil Procedure (wrongly mentioned as Order XXI Rule 58 Code of Civil Procedure) was dismissed are appellants. The first respondent herein filed the suit, O.S. No. 259 of 2003, against the second respondent for realisation of money. Plaintiff filed I.A. 2571 of 2003 along with the suit for attachment before judgment . Defendant accepted the notice and appeared in the case. On 21.07.2003, an undertaking was filed by the defendant stating that she will not alienate the property. Attachment was not ordered in view of the undertaking made

by the defendant. Later, as per the order dated 09.06.2004, the property was attached as the defendant failed to furnish security as ordered by the court.

2. Appellant No.1 is the husband of the defendant and appellant No.2 is the son of the defendant . They claim title under a settlement deed dated 02.06.2004 executed by the defendant in the F.A.O. The court below held that this settlement deed was executed after the undertaking was made by the defendant on 21.07.2003. Therefore the settlement deed is not valid and binding on the plaintiff . Claim petition was therefore rejected.

3. Appellants have produced certain documents as per I.A. 2035 of 2006. The contention of the appellants is that the property originally belonged to one Kamalasanan who executed an assignment deed in favour of appellant No.1, the defendant and one Sukumarapilla as per document No. 4070 of 1981 . Later, as per document No. 1655 of 1985, Sukumarapilla assigned his rights in favour of appellant No.1 and the

defendant . Thus, the appellants contended that de hors the settlement deed executed by the defendant, appellant No.1 has right over the property which was attached. The court below, according to the counsel for the appellant, did not advert to these contentions nor did the court below advert to the evidence placed before it. The Appendix of the order of the court below does not show that evidence was adduced in the case But paragraph '3' of the order would indicate that witnesses were examined. There is no discussion of the evidence of the witnesses in the order. The contentions put forward by the parties are also not properly considered by the court below . Therefore, we are of the view that the court below should be directed to consider the matter afresh after affording an opportunity of being heard to both parties and to adduce evidence and to produce documents.

In the result, the order dated 21.03.2006 in I.A. 2976 of 2004 is set aside and the matter is remanded to the court below for fresh disposal after affording an opportunity of being heard to both the parties and to adduce evidence and to produce documents . The order of attachment

will continue to be in operation till a decision is taken in I.A. 2976 of 2004. The question as to whether the order of attachment should be continued or not will be subject to the order to be passed by the court below . The parties shall appear before the court below on 30.05.2007.

KURIAN JOSEPH,
JUDGE.

K.T. SANKARAN,
JUDGE.

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